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Nevada Security Innovations, LTD. and Safety Officers Union, Petitioner and Federation of Police, Security & Correction Officers-AFSPA. Case 31-RC-8025

August 1, 2002

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN HURTGEN AND MEMBERS COWEN AND BARTLETT

The National Labor Relations Board, by a three-member panel, has considered an objection to a mail ballot election held August 24, 2001, through September 13, 2001, and the hearing officer's report recommending disposition of the objection. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 28 for the Petitioner, 139 for the Intervenor, and 25 against the participating labor organizations, with no challenged ballots and 1 void ballot.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings¹ and recommendations, as modified and discussed below, and finds that a certification of representative should be issued.

The hearing officer recommended overruling the Employer's Objection 1, which alleges, in substance, that a letter sent to employees by an affiliate of the Intervenor misrepresented that the affiliate would be appearing on the ballot. The hearing officer relied on *Midland National Life Insurance*, 263 NLRB 127 (1982), in which the Board held that it generally will not set elections aside on the basis of campaign misrepresentations. Although we agree with the hearing officer that the Employer's objection should be overruled, we do not rely on *Midland*.

Instead, we shall apply the standard the Board set forth in *Pacific Southwest Container*, 283 NLRB 79 (1987). In that case, after the filing of the petition, but before the election, the petitioning union merged with another union, creating a new, much larger labor organization with different officers, constitution, bylaws, and geographic base. The Board set aside the election because it was

unclear whether all unit employees knew of the change in identity and structure of the petitioner, and because the correct, surviving labor organization was not listed on the ballot. Id. at 80.

Although the employer in *Pacific Southwest* framed its objection in misrepresentation terms, the Board was careful to point out that it was "not setting aside the election for that reason." Id. at 80 fn. 7. Rather, the Board found that "the election did not comport with Sec[ti]on 9(a) because we cannot ascertain that a majority of the employees intended to designate [the surviving labor organization] as their collective-bargaining representative." Id.

By contrast, we find here, for the reasons set forth below, that the election in this case did comport with Section 9(a) and that a majority of the employees intended to designate the Intervenor as their collective-bargaining representative. The key facts can be summarized as follows.

The petition was filed by the Safety Officers Union. The Federation of Police, Security & Correction officers AFSPA (FOPSCO or the Intervenor) intervened in this proceeding.

The Employer's objection focuses on an August 13, 2001 letter to employees sent by an affiliated local union of FOPSCO (Local 2001). Concededly, Local 2001's letter could reasonably have confused employees into believing that Local 2001 was participating in the election because the letter directed employees to examine Local 2001's financial reports; the letter referred employees to the Local 2001's website; and the letter concluded by stating that "[w]e stand ready to represent you and invite you to be a member of the greatest Local Union on the West Coast."

One week later, FOPSCO sent its own letter to employees. This letter did not refer to Local 2001, and it encouraged employees to vote for FOPSCO.

Most significantly, in an August 23 letter sent to all employees, the Employer responded to Local 2001's letter and clarified for employees the identity of the labor organization that was seeking to represent them. In no uncertain terms, the Employer's letter stated that Local 2001 "*is not on the NLRB Election Ballot Agreement on which we stipulated!*"; rather, FOPSCO "*is on the ballot.*" (Emphasis in the original.) The letter again distinguished between the two labor organizations when it stated that while Local 2001 "may be financially solvent," FOPSCO "*is not.*" (Emphasis in the original.)

Furthermore, the Board's notice of election clearly listed FOPSCO on the sample ballot. As the hearing officer pointed out, this official Board document would have

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

clarified for voters that it was FOPSCO, not Local 2001, that was seeking to represent them.

Finally, it is undisputed that FOPSCO was correctly identified on the ballots sent to, and marked by, the voters. Local 2001 did not appear on the ballots.

Under these circumstances, we conclude that by the time the ballots were cast, employees would not reasonably have been confused over the identity of the labor organization seeking to represent them. Any confusion engendered by Local 2001's letter would have been dissipated by the subsequent communications from FOPSCO and the Employer, as well as by the Board's Notice of Election and the official election ballots. Thus, we conclude that the employees knew for which union they were voting, and that their right to select their bargaining representative was not compromised. Accordingly, we adopt the hearing officer's recommendation that the Employer's objection be overruled.²

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Federation of Police, Security & Correction Officers-AFSPA, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full time and regular part time security officers employed at various federal agencies locations and facilities as set forth in Attachment B to the Stipulated Election Agreement.

Excluded: Office clerical employees, professional employees, all other employees, supervisors (including lead security officers) as defined in the Act.

Dated, Washington, D.C. August 1, 2002

Peter J. Hurtgen,

Chairman

² The Employer also contends that the Intervenor should not be certified because it intends to transfer its bargaining rights to an affiliated union. The hearing officer rejected this contention on the ground that it raises a "post-election matter." We agree. If any postcertification changes in bargaining representative were to occur, they may be addressed in appropriate subsequent proceedings. See, e.g., *Goad Co.*, 333 NLRB No. 82 (2001) (employer did not violate Sec. 8(a)(5) when it refused to bargain after statutory bargaining representative transferred its representational responsibilities to another labor organization). Here, it is not clear that FOPSCO intended, upon certification, to transfer its bargaining rights. Contrary to our dissenting colleague, we would not give the Employer another chance to make that showing. If, after certification, FOPSCO seeks to transfer bargaining rights, the Board can deal with that in an appropriate case.

Michael J. Bartlett,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

I would remand this case for further hearing. I am of the view that a union's stated intent at the time of the election to transfer its bargaining rights post-certification to another union compromises the employees' rights to select their representative. Even assuming that, despite the confusion created by Local 2001's letter, the employees here would not reasonably have been confused over the identity of the labor organization seeking to represent them, as found by the majority, I would not overrule the Employer's objection on the basis of the record before us. I find an issue raised as to whether the Intervenor intended to represent the employees once it is certified.

I disagree with my colleagues' acceptance of the hearing officer's proposition that prospective changes in the identity of the bargaining representative are appropriately addressed in subsequent proceedings. Evidence that a union does not unequivocally intend at the time of the election to represent employees itself, but rather would transfer bargaining rights to another union, in my view is sufficient to preclude certification. Thus, if the record demonstrates that the Intervenor had a clear plan to transfer bargaining rights to either Local 2001 or another affiliate, I would sustain the Employer's objection.

The hearing officer made no findings as to the Intervenor's intent to represent the unit based on the view that this issue could be addressed in a later proceeding. I would remand the case to the hearing officer to reopen the record in order to fully develop the record on this issue and make findings resolving whether at the time of the election the Intervenor intended to transfer bargaining rights to some other labor organization or affiliate.

Dated, Washington, D.C. August 1, 2002

William B. Cowen,

Member

NATIONAL LABOR RELATIONS BOARD